

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

**JOE CLARK MITCHELL v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Maury County**  
**Nos. 311-12, 2314, 2316-18, 2320-22 Robert Holloway, Judge**

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**No. M2008-01315-CCA-R3-HC - Filed April 28, 2009**

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This matter is before the Court upon the State's motion to affirm the judgment of the habeas corpus court by memorandum opinion pursuant to Rule 20 of the Rules of the Court of Criminal Appeals. Petitioner has appealed the habeas corpus court's order summarily dismissing the petition for writ of habeas corpus. Upon a review of the record in this case, we are persuaded that the habeas corpus court was correct in summarily dismissing the habeas corpus petition and that this case meets the criteria for affirmance pursuant to Rule 20 of the Rules of the Court of Criminal Appeals. Accordingly, the State's motion is granted and the judgment of the habeas corpus court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Affirmed.**

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES, and ROBERT W. WEDEMEYER, JJ., joined.

Joe Clark Mitchell, Pro Se, Only, Tennessee.

Robert E. Cooper Jr., Attorney General & Reporter; Clarence E. Lutz, Assistant Attorney General, for the appellee, State of Tennessee.

**MEMORANDUM OPINION**

Petitioner has a long and complicated history with the appellate courts. The following history was set out by this Court in Petitioner's most recent habeas corpus appeal:

In 1982, Petitioner was indicted by the Maury County Grand Jury for two counts of aggravated sexual battery, two counts of aggravated kidnapping, two counts of armed robbery, two counts of aggravated assault, one count of first degree burglary and one count of arson. In 1983, in a second indictment, Petitioner was indicted on two counts of aggravated rape arising out of the same incident. In 1986, Petitioner was convicted by a jury of two counts of aggravated assault, two counts of armed robbery, two counts of aggravated kidnapping, one count of arson, one count of first degree burglary and two counts of aggravated rape. The trial court dismissed the aggravated sexual battery charges. All of Petitioner's convictions arose out of one criminal spree in which he terrorized two women for a number of hours. *State v. Joe Clark Mitchell*, No. 87-152-III, 1988 WL 32362, at \*1 (Tenn. Crim. App., at Nashville, Apr. 7, 1988), *perm. app. denied*, (Tenn. Jun. 27, 1988). The trial judge ordered Petitioner's four life sentences for both counts of aggravated kidnapping and both counts of aggravated rape to run consecutively and all other sentences to run concurrently with the four life sentences.

On direct appeal, this Court summarized the facts leading up to Petitioner's convictions as follows:

One of the victims testified that as she was leaving her friend's house, a man started towards her across the lawn. He hit her several times with a large stick, and he was armed with a gun and a hunting knife. He forced both women into the house, and used duct tape to tape their ankles, arms, mouths, and eyes. He stole their jewelry and ransacked the house. He used a knife to cut the clothes off the testifying witness and raped her. Then he set fire to the house. He carried both women to a car, drove around for several hours, stopping at one point to rape the witness one more time. He eventually abandoned the car and the women, and they were able to free themselves and walk for help.

*Joe Clark Mitchell*, 1988 WL 32362, at \*1.

Following our review, this Court affirmed the trial court's judgments as to all counts except for Petitioner's conviction for aggravated rape under count two of indictment No. M2322. *Id.* We concluded that the evidence was insufficient to show that the second rape in the victim's car was accomplished with the use of either Petitioner's gun or his hunting knife. *Id.* However, the evidence was sufficient to sustain a conviction for simple rape as a lesser included offense of aggravated rape. *Id.* Accordingly, this Court reduced Petitioner's conviction for count two of indictment No. M2322 to rape and sentenced Petitioner as a Range II multiple

offender to thirteen years imprisonment. *Id.* We ordered Petitioner's sentence for rape to be served consecutively to Petitioner's remaining three life sentences, leaving Petitioner with an effective sentence of three consecutive life sentences plus thirteen years. *Id.*

Petitioner subsequently sought post-conviction relief. *See Joe Clark Mitchell v. State*, No. 01-C01-9007-CC-00158, 1991 WL 1351, at \*1 (Tenn. Crim. App., at Nashville, Jan. 11, 1991), *perm. app. denied*, (Tenn. Apr. 15, 1991). This Court affirmed the summary dismissal of the petition for post-conviction relief, and the Tennessee Supreme Court subsequently denied permission to appeal. *Id.*

Petitioner has previously sought habeas corpus relief in state court. In his first petition for habeas corpus relief, Petitioner claimed that the indictments issued against him were fatally defective and that this Court's reduction of one of his aggravated rape convictions to simple rape on direct appeal violated the constitutional prohibition against double jeopardy. *See Joe Clark Mitchell v. State*, No. M2002-02011-CCA-R3-CO, 2003 WL 22243287, at \* 1 (Tenn. Crim. App., at Nashville, Sept. 30, 2003), *perm. app. denied*, (Tenn. Dec. 29, 2003). As to the aggravated rape conviction, Petitioner argued that because the jury convicted him of the greater charge of aggravated rape, the jury acquitted him of all lesser included offenses and that when this Court found the evidence insufficient to support the conviction for aggravated rape on appeal, it did not have jurisdiction to reduce his sentence to simple rape. *Id.* at \*2. This Court affirmed the dismissal of the petition for habeas corpus relief, determining that the indictments provided Petitioner with adequate notice of the charges against him and that his dubious claim regarding the reduction of the aggravated rape conviction would at most render his conviction voidable rather than void. *Id.* at \*3-4.

In May of 2003, Petitioner filed a Motion to Correct Illegal Sentence alleging, among other things, that his sentence was illegal because the trial court was obligated to order Petitioner to serve all of his sentences consecutively to each other as the offenses were committed while he was out on bail and/or probation. *See Joe Clark Mitchell v. State*, No. M2005-00229-CCA-R3-CO, 2005 WL 3115858, at \* 1 (Tenn. Crim. App., at Nashville, Nov. 21, 2005). Subsequently, Petitioner filed a pro se Motion to Dismiss and Expunge the Record, asserting claims similar to those previously raised in his habeas corpus petition. For example, Petitioner again argued that this Court was without jurisdiction to reduce his aggravated rape conviction to simple rape. The trial court summarily denied the motion and ordered Petitioner to pay the court costs associated with the filing of the motion. *Id.* This Court affirmed the trial court's ruling pursuant to Rule 20 of the Court of Criminal Appeals, noting that Petitioner's issues had already been addressed in his first habeas corpus petition. *Id.* at \*3.

On July 19, 2006, Petitioner filed a second petition for habeas corpus relief. The petition spans nearly twenty-six pages, throughout which Petitioner argues that: (1) the judgments of the trial court and appellate court are in conflict with one another and void; (2) the sentences that were imposed as a result of the “rape/arson incident” were imposed in direct violation of Tennessee law and void because Petitioner was out on bail when he allegedly committed the crimes and, therefore, all sentences should have run consecutively to each other; (3) he was sentenced in violation of Tennessee law because he was not sentenced on each conviction “after the first;” and (4) all of his convictions have been running concurrently with each other because they were “not legally ordered to be served consecutive.” The trial court summarily dismissed the petition for habeas corpus relief.

On September 19, 2006, Petitioner filed both a Notice of Appeal in the Tennessee Court of Appeals and a Motion to Amend or Find Additional Facts. The Court of Appeals, in an order entered October 16, 2006, determined that the trial court retained jurisdiction to consider Petitioner’s post-judgment motion and that the notice of appeal should “be treated as filed after the entry of the order disposing of the post-judgment motion.” On October 31, 2006, the Court of Appeals transferred the case to this Court because it was a habeas corpus proceeding. On December 5, 2006, the trial court entered an order denying Petitioner’s Motion to Amend or Find Additional Facts.

*Joe Clark Mitchell v. State*, No. M2006-02023-CCA-R3-HC, 2008 WL 203649, at \*1-3 (Tenn. Crim. App., at Nashville, Jan. 24, 2008). On appeal, this Court affirmed the trial court’s summary dismissal based upon procedural grounds for not attaching prior writs and not attaching documentation to show he was on bail at the time he committed the offenses in question. *Id.* at \*5.

On April 17, 2008, Petitioner filed what he stated was his fourth petition for writ of habeas corpus. In this petition, he argued that his sentences were illegal with regard to his convictions for the terrorization of the two women because they were not ordered to be served consecutively to sentences stemming from two previous convictions for which he was out on bail at the time he committed the offenses in question.

The habeas corpus court filed an order dismissing Petitioner’s petition. The habeas corpus court stated that the judgments for the September 25, 1986 convictions were silent with regard to running concurrently or consecutively to the sentences from the two previous convictions. Rule 32(c)(3) of the Rules of Criminal Procedure, which governs mandatory sentences, requires that the sentences be run consecutively when the judgments are silent and a defendant has committed an offense while on bail for another.

## Analysis

The determination of whether to grant habeas corpus relief is a question of law. *See Hickman v. State*, 153 S.W.3d 16, 19 (Tenn. 2004). As such, we will review the habeas corpus court's findings de novo without a presumption of correctness. *Id.* Moreover, it is the petitioner's burden to demonstrate, by a preponderance of the evidence, "that the sentence is void or that the confinement is illegal." *Wyatt v. State*, 24 S.W.3d 319, 322 (Tenn. 2000).

Article I, section 15 of the Tennessee Constitution guarantees an accused the right to seek habeas corpus relief. *See Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999). A writ of habeas corpus is available only when it appears on the face of the judgment or the record that the convicting court was without jurisdiction to convict or sentence the defendant or that the defendant is still imprisoned despite the expiration of his sentence. *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993); *Potts v. State*, 833 S.W.2d 60, 62 (Tenn. 1992). In other words, habeas corpus relief may be sought only when the judgment is void, not merely voidable. *See Taylor*, 995 S.W.2d at 83. "A void judgment 'is one in which the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment or because the defendant's sentence has expired.' We have recognized that a sentence imposed in direct contravention of a statute, for example, is void and illegal." *Stephenson v. Carlton*, 28 S.W.3d 910, 911 (Tenn. 2000) (quoting *Taylor*, 955 S.W.2d at 83).

However, if after a review of the habeas petitioner's filings the habeas corpus court determines that the petitioner would not be entitled to relief, then the petition may be summarily dismissed. T.C.A. § 29-21-109; *State ex rel. Byrd v. Bomar*, 381 S.W.2d 280 (Tenn. 1964). Further, a habeas corpus court may summarily dismiss a petition for writ of habeas corpus without the appointment of a lawyer and without an evidentiary hearing if there is nothing on the face of the judgment to indicate that the convictions addressed therein are void. *Passarella v. State*, 891 S.W.2d 619 (Tenn. Crim. App. 1994).

The procedural requirements for habeas corpus relief are mandatory and must be scrupulously followed. *Hickman*, 153 S.W.3d at 19-20; *Archer*, 851 S.W.2d at 165. For the benefit of individuals such as Petitioner, our legislature has explicitly laid out the formal requirements for a petition for a writ of habeas corpus at Tennessee Code Annotated section § 29-21-107:

(a) Application for the writ shall be made by petition, signed either by the party for whose benefit it is intended, or some person on the petitioner's behalf, and verified by affidavit.

(b) The petition shall state:

(1) That the person in whose behalf the writ is sought, is illegally restrained of liberty, and the person by whom and place where restrained, mentioning

the name of such person, if known, and, if unknown, describing the person with as much particularity as practicable;

(2) The cause or pretense of such restraint according to the best information of the applicant, and if it be by virtue of any legal process, a copy thereof shall be annexed, or a satisfactory reason given for its absence;

(3) That the legality of the restraint has not already been adjudged upon a prior proceeding of the same character, to the best of the applicant's knowledge and belief; and

(4) That it is the first application for the writ, or, is a previous application has been made, a copy of the petition and proceedings thereon shall be produced, or satisfactory reasons be given for the failure so to do.

“A habeas corpus court may properly choose to dismiss a petition for failing to comply with the statutory procedural requirements; however, dismissal is not required.” *Hickman*, 153 S.W.3d at 21.

The habeas corpus court dismissed the petition based upon the judgments' silence with regard to running consecutively to Petitioner's sentences derived from convictions for which Petitioner was on bail at the time he committed the offenses in question. The habeas corpus court relied upon the mandatory requirement set out in Rule 32(c)(3) of the Rules of Criminal Procedure.

Tennessee Code Annotated section 40-20-111(b) and Rule 32(c)(3)(C) of the Rules of Criminal Procedure require that a new sentence be run consecutively to a prior sentence when the new sentence derives from an offense committed while the defendant is on bail and is later convicted for both offenses. Rule 32(c)(3) states this is the case “whether the judgment explicitly so orders or not.” Under this Rule, Petitioner's sentences for the convictions related to the terrorization of the two women should be run consecutively to his previous sentences. The judgment forms for Petitioner's convictions are blank with respect to whether those sentences are to be served concurrently or consecutively to his prior sentences.

In *Hogan v. Mills*, 168 S.W.3d 753 (Tenn. 2005), the petitioner's basis for habeas corpus relief was based on mandatory consecutive sentences under Rule 32(c)(3)(A). Our supreme court stated:

Hogan is not entitled to relief on the ground that the judgments for the 1985 convictions do not explicitly provide that the sentences are to be served consecutively to the sentence for the 1981 conviction. Rule 32(c)(3) mandates that new sentences run consecutively to the prior sentence “whether the judgment explicitly so orders or

not.” Thus, the new sentences run consecutively to the prior sentence even if the judgment is silent in this regard.

*Hogan*, 168 S.W.3d at 756. Therefore, our supreme court has held that a judgment’s silence with regard to consecutive sentencing is not a basis for habeas corpus relief. The judgments in question are not void on their face. *Id.*; *See also, Barry Sotherland v. State*, No. M2006-01891-CCA-R3-PC, 2007 WL 1237786, at \* 4 (Tenn. Crim. App., at Nashville, April 27, 2007). Petitioner is not entitled to relief on this issue.

### **Conclusion**

Rule 20 of the Rules of the Court of Criminal Appeals provides:

The Court, with the concurrence of all judges participating in the case, when an opinion would have no precedential value, may affirm the judgment or action of the trial court by memorandum opinion rather than by formal opinion, when:

(1)(a) The judgment is rendered or the action taken in a proceeding before the trial judge without a jury, and such judgment or action is not a determination of guilt, and the evidence does not preponderate against the finding of the trial judge, . . . .

We determine that this case meets the criteria of the above-quoted rule and, therefore, we grant the State’s motion filed under Rule 20, and we affirm the judgment of the habeas corpus court.

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JERRY L. SMITH, JUDGE